Supreme Court, U.S.
FILED

97 1151 DEC 23 1997

OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

WILLIAM O. GENDREAU,

Petitioner,

v.

COLLEEN RAE GENDREAU,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN R. MARTZ, LTD.
John R. Martz, Esq.
440 Ridge St., Suite 3
Reno, NV 89501
(702) 329-4554

15 pp

QUESTION PRESENTED

The court of appeals affirmed a bankruptcy court decision that the claim of the debtor's former spouse to assets in a bankruptcy debtor's ERISA pension plan does not qualify as a "debt" subject to discharge.

The question presented for review is whether or not a domestic relations order, which is not a Qualified Domestic Relations Order [29 U.S.C. §1056(d)(3)(B)(i)], may create enforceable rights against a pension plan and its administrator.

LIST OF ALL PARTIES TO THE PROCEEDING

The adversary proceedings in the bankruptcy court included, in addition to petitioner and respondent,

United Airlines, Inc.

PAWPAC

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PETITION FOR WRIT OF CERTIORARI

William O. Gendreau ("Gendreau") respectfully prays that a writ of certiorari issue to review the Opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on August 15, 1997. The United States Court of Appeals for the Ninth Circuit has decided an important federal question in a way that conflicts with relevant decisions of the United States Supreme Court.

OPINIONS BELOW

The opinion of the Bankruptcy Appellate Panel of the Ninth Circuit, which gave rise to the appeal to the Ninth Circuit Court of Appeals, is published as *In re Gendreau, Gendreau v. Gendreau*, 191 B.R. 798 (1995). It is reprinted in Appendix B hereto ("Appendix B") at Page A-3. By order filed January 31, 1996, the Bankruptcy Appellate Panel denied a petition for rehearing, Appendix D, A-72.

The opinion of the United States Court of Appeals for the Ninth Circuit, which gives rise to this petition, is published as *In re Gendreau: Gendreau v. Gendreau*, 122 F.3d. 815 (1997). It is

reprinted in Appendix C hereto at Page A-56. By order filed September 29, 1997, the Ninth Circuit denied a petition for rehearing and suggestion for rehearing *en banc*, Appendix E, A-70.

JURISDICTION

On July 7, 1994, the United States Bankruptcy Court for the District of Nevada entered a final judgment against Gendreau in an adversary proceeding within the Chapter 7 Bankruptcy case of Gendreau. Gendreau timely appealed to the United States Bankruptcy Appellate Panel of the Ninth Circuit. On January 31, 1996, the United States Bankruptcy Appellate Panel of the Ninth Circuit filed an Amended Opinion affirming the judgment of the court below.

Gendreau's petition for rehearing in the United States Bankruptcy Appellate Panel of the Ninth Circuit was denied by order filed January 31, 1996. Thereafter Gendreau appealed to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals filed its opinion August 15, 1997, affirming the judgment of the Bankruptcy Court and the opinion of the Bankruptcy Appellate Panel of the Ninth Circuit. On September 29, 1997, Gendreau's timely filed Motion for Rehearing and Suggestion

for Rehearing *En Banc* was denied. Pursuant to Supreme Court Rule 13.1 this petition has been filed within Ninety (90) days of the denial of rehearing.

The jurisdiction of this court is invoked pursuant to 28 U.S. Code §1254(1).

STATUTES INVOLVED IN THIS CASE

11 U.S.C. §523. Exceptions to discharge.

29 U.S.C. §1056(d). Assignment or alienation of plan benefits.

STATEMENT OF THE CASE

A Virginia Court issued a divorce decree awarding Colleen Gendreau ("Colleen") an interest in money accrued by Gendreau, (while Colleen and Gendreau were married) in his two United Airlines pension plans. The Virginia Court also issued an Order, entitled Qualified Domestic Relations Order, directing the pension plan administrator to pay Colleen directly. This Order was intended to satisfy the QDRO exception to the anti-alienation provisions of the Employee Retirement Income Security Act ("ERISA").

The pension plan administrator determined that the Virginia Court's order does not meet the criteria for a

QDRO and is therefore not a QDRO. He refused to pay Colleen until he received a QDRO. No further action was taken by Colleen. The issue of whether or not the Virginia Court's order is a QDRO is not in dispute. The order is *not* a QDRO.

Several months after the determination by the plan administrator, Gendreau filed Chapter 7 bankruptcy and in those proceedings he brought an adversary proceeding to declare the "debt" to Colleen discharged. At the time, 11 U.S.C. §523 provided that property settlement debts were dischargeable.[1] The Bankruptcy court had jurisdiction over the adversary proceeding pursuant to 28 U.S.C. §1334. This was a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

Both sides moved for Summary Judgment in the adversary proceeding. The bankruptcy court granted Colleen's motion and denied Gendreau's motion. The Bankruptcy Appellate Panel of the Ninth Circuit affirmed in a split decision. *In re Gendreau: Gendreau v. Gendreau*, 191

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[1] Appendix F contains the text of 11 U.S.C. §523 as it existed at the applicable time, i.e., prior to the enactment of the Bankruptcy Reform Act of 1994. Pub. L. No. 103-394 (effective October 22, 1994).

B.R. 798 (1995). The Ninth Circuit Court of Appeals affirmed *In re Gendreau: Gendreau v. Gendreau,* 122 F.3d. 815 (1997).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's Opinion is Directly Contrary to this Court's Pronouncement's in *Guidry v. Sheet Metal Worker's Nat'l. Pension Fund.*

The Ninth Circuit Court of Appeals affirmed based on its conclusion that it does not make any difference that the Virginia Court's order is not a QDRO. The court states that "Whether or not Colleen's domestic relations order, as issued, was a QDRO is irrelevant: The QDRO provisions of ERISA do not suggest that Colleen has *no* interest in the plans until she obtains a QDRO, they merely prevent her from enforcing her interest until the QDRO is obtained." *Gendreau, supra.* at 819. The court also states that "...Colleen's claim is against the United Pilot's pension plans and not against William" *Gendreau, supra.* at 818.

Since there is no statutory basis for recognizing any legal interest in an ERISA plan unless the claimant has obtained a QDRO, or there is an

unresolved dispute as to whether or not the order is a QDRO, the Court of Appeals has effectively imposed a constructive trust on a portion of the funds in the pension plan.

In *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990) this court considered an appeal from a decision of the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit had affirmed a district court decision which imposed a constructive trust on funds in an ERISA pension plan. This court reversed stating: "[The constructive trust] remedy is therefore prohibited by §206(d)(1) [29 U,S.C. §1056(d)(1)] unless some exception to the general statutory ban is applicable." *Guidry, supra*. at 372.

In the case at bar there is *no* applicable exception to the general statutory ban. The QDRO exception to the ERISA statute [29 U.S.C. §1056(d)(3)(A)] is unavailable because the Virginia Court's order is not a QDRO. The plan administrator is statutorily empowered to determine whether or not a domestic relations order is a QDRO [29 U.S.C. §1056(d)(3)(G)(i)(II)] and in this case he determined that the order is not a QDRO. Moreover, the issue of whether or not the Virginia Court's order is a QDRO

is not now and never has been in dispute. The order is not a QDRO.

In *Guidry, supra.*, this court admonished that "It makes little sense to adopt such a [anti-alienation] policy and then to refuse enforcement whenever enforcement appears inequitable. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the rule in particular circumstances would be "especially" inequitable. The impracticality of defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress." *Guidry, supra.* at 377. In permitting the imposition of a constructive trust, in the absence of a statutory exception to the anti-alienation provisions of ERISA, the Ninth Circuit has essentially disregarded this court's decision in *Guidry, supra.*

Subsection (d)(3)(I) of 29 USC §1056 provides as follows:

> (I) If a plan fiduciary acts in accordance with part 4 of this subtitle [29 USC §§1101 et seq.] in-
>
> treating a domestic relations order as being (or

> not being) a qualified domestic relations order, or
>
> (ii) taking action under subparagraph (H),
>
> then the plan's obligation to the participant and each alternate payee shall be discharged to the extent of any payment made pursuant to such Act.

Not only has the Ninth Circuit essentially disregarded this court's decision in *Guidry, supra.*, the Ninth Circuit has also opened the door for suits for money damages against pension plans, even though such suits are statutorily barred when the plan administrator has acted prudently in the discharge of his duty to determine the nature of a domestic relations order. The decision of the Ninth Circuit in this case means that once a plan administrator receives an order purporting to be a QDRO, she risks suit if she distributes to the primary beneficiary of the plan, whether or not the order is a QDRO.

CONCLUSION

The Ninth Circuit Opinion is irreconcilable with this court's decision in *Guidry, supra,* contravenes the applicable federal statute, and portends uncertainty and delay in the administration of ERISA pension plans. Certiorari is appropriate.